Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

AYUDA, INC., *et al.*,

Petitioners.

v.

JANET RENO, *et al.*,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District of Columbia Circuit impermissibly failed to follow the mandates of this Court in *Ayuda, Inc. v. Reno,* 113 S. Ct. 3026 (1993), and *Reno v. Catholic Social Services, Inc.,* 113 S. Ct. 2458 (1993), by refusing to remand *Ayuda* to the district court for further factual findings on whether certain *Ayuda* claimants were front-desked and therefore had claims that were ripe for review, despite the fact that there was substantial factual evidence in the record showing that many claimants had been front-desked?

2. Whether the District of Columbia Circuit misread this Court's opinion in *Reno v. Catholic Social Services, supra,* to preclude completely federal question jurisdiction over generic legal challenges to legalization policies of the Immigration and Naturalization Service?

PARTIES TO THE PROCEEDING

The parties in this Court are as follows:

Petitioners: Ayuda, Inc., the Ethiopian Community Center, Inc., Latin American Youth Center, Mexican American Legal Defense and Educational Fund, N.K. Doe, J.H. Doe, T.B. Doe, K.A.A. Doe and J.N.U. Doe.

Respondents: Janet Reno, individually and as Attorney General of the United States, Doris Meissner, individually and as the Commissioner of the Immigration and Naturalization Service, and the Immigration and Naturalization Service.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

AYUDA, INC., *et al.*,

Petitioners,

v.

JANET RENO, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Ayuda, Inc., et al., respectfully petition that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on October 26, 1993.

OPINIONS BELOW

The majority opinion of a panel of the United States Court of Appeals for the District of Columbia Circuit, on remand from this Court, in *Ayuda, Inc. v. Reno* was entered on October 26, 1993, and is reported at 7 F.3d 246 (D.C. Cir. 1993), and reprinted in the Appendix to this Petition at page 1a ("App. 1a"). The dissenting opinion is reported at 7 F.3d at

251, App. 15a. The panel, by a 2-1 vote, subsequently denied Petitioners' Petition for Rehearing and the full Court of Appeals, with two Judges dissenting, denied Petitioners' Suggestion for Rehearing *En Banc* on January 27, 1994. The Order Denying Petitioners' Petition for Rehearing may be found at App. 25a. The Order denying Petitioners' Suggestion for Rehearing *En Banc* is reported at *Ayuda, Inc. v. Reno*, 14 F.3d 61 (D.C. Cir. 1994), App. 27a, with the dissenting opinion to that Denial at 14 F.3d 61, App. 28a.

This case has twice previously been before this Court. On June 28, 1993, this Court, in *Ayuda, Inc. v. Reno*, 113 S. Ct. 3026 (1993), App. 30a, vacated and remanded a previous decision of the D.C. Circuit in *Ayuda, Inc. v. Thornburgh*, 948 F.2d 742 (D.C. Cir. 1991). The majority opinion of the D.C. Circuit in that case is reported at 948 F.2d 742, App. 31a, and the dissent is reported at 948 F.2d at 760, App. 65a. Petitioners' Petition for Rehearing in that case had been denied by a 2-1 vote and the full Court of Appeals, by a 6-5 vote, denied Petitioners' Suggestion for Rehearing *En Banc* on March 3, 1992. The three opinions, written by Circuit Judges Wald, Silberman, and Williams, covering the denial of the Suggestion for Rehearing *En Banc* are reported at 958 F.2d. 1089 (D.C. Cir. 1992), App. 96a.

The original majority and dissenting opinions of the District of Columbia Circuit in *Ayuda, Inc. v. Thornburgh* are reported at 880 F.2d 1325 and 1346 (D.C. Cir. 1989), App. 121a and 164a. The 2-1 denial of Petitioners' Petition for Rehearing and the four opinions (written by then Chief Judge Wald, Circuit Judges Silberman and Buckley, and then Circuit Judge, now Justice, Ruth B. Ginsburg) which were filed in the 5-4 denial by the full Court of Appeals of Petitioners' Suggestion for Rehearing *En Banc* in that earlier case are not officially reported but may be found at *Ayuda, Inc. v. Thornburgh*, No. 88-5226 (D.C. Cir. Oct. 4, 1989) (available at 1989 U.S. App. LEXIS 10736), App. 208a. The D.C. Circuit's decision in this

case was vacated and remanded by this Court in *Ayuda, Inc. v. Thornburgh*, 498 U.S. 1117 (1991), App. 107a.

The unanimous opinion of a panel of the District of Columbia Circuit denying Respondents' request for a Writ of Mandamus, *In Re: Richard Thornburgh*, is reported at 869 F.2d 1503 (D.C. Cir. 1989), App. 216a.

The original opinion of the United States District Court for the District of Columbia, *Ayuda, Inc. v. Meese*, is reported at 687 F. Supp. 650 (D.D.C. 1988), App. 246a. Supplemental Orders of the District Court follow immediately after that opinion, and further orders are reported at 700 F. Supp. 49 (D.D.C. 1988), App. 296a. The order denying Petitioners' request to hold the government in contempt is not officially reported but may be found at *Ayuda, Inc. v. Thornburgh*, No. 88-0625 (D.D.C. June 29, 1989) (available at 1989 U.S. Dist. LEXIS 7497), App. 309a. The district court subsequently held an evidentiary hearing and issued Supplemental Order XIV on September 6, 1990, granting certain interim relief to qualified applicants. This order is reported at *Ayuda, Inc. v. Thornburgh*, 744 F. Supp. 21 (D.D.C. 1990), App. 322a. The Order was later stayed by the D.C. Circuit on November 13, 1990. *Ayuda, Inc. v. Thornburgh*, 919 F.2d 153 (D.C. Cir. 1990), App. 108a.

JURISDICTION

The judgment of the Court of Appeals was entered on October 26, 1993. A timely Petition for Rehearing and a Suggestion for Rehearing *En Banc* in the Court of Appeals were denied on January 27, 1994. Subsequently, by order dated April 13, 1994, the Honorable William H. Rehnquist, Chief Justice of the United States, extended the time for filing a petition for a writ of certiorari to and including May 27, 1994.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(a).

STATUTES AND REGULATIONS INVOLVED

The relevant statutory provisions and regulations involved in this proceeding are reprinted in the Appendix. They are: Immigration and Nationality Act ("INA") Sections 106, App. 333a; 210(e), App. 338a; 245A(a)(2), App. 340a; 245A(f), App. 341a; and 279 App. 344a (8 U.S.C. §§1105a, 1255a(a)(2), 1255a(f), and 1329 (1988), respectively); 28 U.S.C. §1331 (1988), App. 345a; former Section 265 of the INA, 8 U.S.C. §1305 (1976), App. 343a; and 8 C.F.R. §§245a.1(d) and 245a.2(b)(3) (1987), App. 346a.

STATEMENT OF THE CASE

Petitioners are before this Court for a third time to request review of a ruling by the United States Court of Appeals for the District of Columbia Circuit. On two previous occasions, *Ayuda, Inc. v. Thornburgh*, 498 U.S. 1117 (1991), App. 107a, and *Ayuda, Inc. v. Reno*, 113 S. Ct. 3026 (1993), App. 30a, this Court has vacated and remanded decisions of the D.C. Circuit for reconsideration in light of companion cases decided by the Court on certiorari from the Ninth Circuit - the first being *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991) ("*McNary*") and the second *Reno v. Catholic Social Services, Inc.*, 113 S. Ct. 2485 (1993) ("*CSS*"). As part of its decision in the latest case, *CSS*, this Court ordered the Ninth Circuit "to remand to the respective District Courts" for further proceedings. *CSS*, 113 S. Ct. at 2500. The Ninth Circuit subsequently did so in *Catholic Social Services, Inc. v. Reno*, 996 F.2d 221 (9th Cir. 1993) and *League of United Latin American Citizens v. INS*, 999 F.2d 1362 (9th Cir. 1993); however, the D.C. Circuit, on remand in *Ayuda*, refused to remand to the district court, holding that "the district court lacked jurisdiction in this case ...." *Ayuda, Inc. v. Reno*, 7 F.3d at 247, App. 1a.

Petitioners are seeking a Writ of Certiorari for this Court to review the D.C. Circuit's finding of a lack of jurisdiction and its refusal to remand to the district court.

The *Ayuda* suit was originally instituted in the district court on March 8, 1988, by four immigration counseling organizations, including two Qualified Designated Entities ("QDEs"),[1] and, as a class action, by five aliens, individually, and on behalf of a class of others similarly situated.[2] The case involved the "known to the Government" provision of 8 U.S.C. §1255a(2)(B). Under 8 U.S.C. §1255a(a)(2)(B), certain aliens who are "nonimmigrants" (i.e., persons who entered the United States lawfully prior to 1982 for a temporary period) are

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[1] A Qualified Designated Entity is a non-profit organization, such as Petitioners Ayuda, Inc. and the Ethiopian Community Center, that contracts, *inter alia*, to receive and screen legalization applications pursuant to the Immigration Reform and Control Act of 1986, and to provide assistance and information to aliens seeking legalization benefits. The designation of these organizations to assume such a role derives from a Congressional grant of special status in the Immigration Reform and Control Act of 1986. *See* 8 U.S.C. §1255a(c); *Ayuda, Inc. v. Meese*, 687 F.Supp. 650, 655-658 and n.4 (D.D.C. 1988), App. 256a-263a and n.4.

[2] The district court found that the organizational plaintiffs had standing to challenge the INS regulation, and therefore it found it did not need to certify the class. On September 2, 1988, plaintiffs before the district court sought to amend their Complaint for Injunctive and Declaratory Relief to add as individual plaintiffs certain other aliens who had been or would be denied legalization benefits. At that time, plaintiffs also moved for class certification. Both motions remain pending. *See In Re: Richard Thornburgh, supra*, 869 F.2d at 1506, 1509, App. 216a, 221a, and *Ayuda, Inc. v. Reno, supra*, 7 F.3d at 252-53, App. 19a (Wald, J., dissenting).

entitled to legalization if they had violated restrictions on their non-immigrant status as of January 1, 1982, and if their resultant "unlawful status was known to the Government as of [January 1, 1982]."

Despite the plain statutory language and the Congressional order to the INS to implement legalization in a "liberal and generous fashion" so that "millions" of aliens living in the U.S. illegally since 1982 would "emerge from the shadows", 132 Cong. Rec. H. 9709 (Oct. 9, 1986), the INS issued regulations in May 1987 that narrowly defined "known to the Government" to require the aliens' presence to have been "known to INS" prior to January 1, 1982. 52 *Fed. Reg.* 16205, 16206 (1987); 8 C.F.R. §245a.1(d) (1987). On September 22, 1987, the United States District Court for the Northern District of Texas, on a Motion for a Writ of Habeas Corpus, held that the INS regulations regarding the term "known to the Government" were inconsistent with IRCA and outside the scope of the INS authority. *Farzad v. Chandler*, 670 F.Supp. 690 (N.D. Tex. 1987). The INS disregarded this district court's holding and continued to use the May 1987 regulation without modification. Petitioners therefore filed this action.[3]

On March 30, 1988, the district court rejected the INS definition of the phrase "known to the Government" as violative of the "crystal clear" statutory language, as well as the "broad remedial purpose" of the statute. *Ayuda, Inc. v. Meese*, 687

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[3] The first count of the Complaint asserted that the INS regulation at 8 C.F.R. §245a.1(d) violated the statutory terms of 8 U.S.C. §1255a(a)(2)(B), and was arbitrary, capricious, and in excess of statutory authority under the Administrative Procedure Act. The second count asserted a constitutional claim - that the regulation, and the INS's policies and practices pursuant to that regulation, violated the Fifth Amendment to the United States Constitution.

F.Supp. 650, 661-65 (D.D.C. 1988), App. 269a-278a.[4] The district court therefore declared the INS regulation to be contrary to law. *Id.* at 666, App. 280a. The INS later acquiesced in this ruling (and the first three Supplemental Orders entered in the case) and did not appeal the decision. *See* "Defendant's Opposition to Plaintiffs' Motion for Entry of Supplemental Order VIII" filed May 17, 1988, at page 9.

On April 21, 1988, a Motion to Intervene as Plaintiffs, with a Proposed Complaint, was filed by an additional group of immigration counseling organizations ("Proposed Intervenors"). Proposed Intervenors asserted that aliens who had failed to file annual or quarterly registration reports with the INS, pursuant to former INA Section 265, 8 U.S.C. §1305 (hereinafter "§265")[5], were also eligible for legalization under the "known to the Government" provision, because their violation, which constituted a deportable offense, made their unlawful status "known to the Government". Plaintiffs incorporated as their own the arguments and evidence presented by the Proposed

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[4] Because the district court found the regulation to be inconsistent with IRCA and thus outside the scope of the INS's authority, the court necessarily did not reach the issue of whether the regulation and the practices and procedures of the INS violated the Constitution.

[5] Prior to January 1, 1982, there were three distinct reporting requirements for nonimmigrants under §265: an annual report every January on Form I-53, a report every 90 days on Form AR-11, and a report within ten days of every address change on Form AR-11. *See* 8 U.S.C. §1305 (1976). Therefore, Proposed Intervenors contended, as of January 1, 1982, the INS was able to determine by the nonexistence of these reports which aliens were in an unlawful status for failure to comply with the address reporting requirements of §265, because INS had records for all nonimmigrants showing their admission into the country.

Intervenors.[6] The uncontroverted evidence included documentation of the INS's uniform refusal to consider a §265 violation as "known to the Government".[7]

On May 2, 1988 - two days prior to the May 4, 1988, filing deadline for legalization applications - the district court entered Supplemental Order V which enjoined the INS from denying legalization to nonimmigrant aliens who failed to comply with the mandatory quarterly or annual registration requirements of §265, if the INS determined that such aliens credibly established their willful violation of §265, and also met all other application conditions for legalization. *Ayuda, Inc. v. Meese*, 687 F.Supp. at 668, App. 284a. On July 5, 1988, Respondents filed a Notice of Appeal.[8]

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[6] *See* "Plaintiff's Motion to Admit Additional Co-Counsel" filed on April 28, 1988, at 1. The Motion was granted by the district court on the same day as it was filed. *See also* note 1 to "Plaintiffs' Memorandum in Reply to Defendants' Opposition to Intervenors' Motion to Compel Compliance and/or Modify Permanent Injunctions," filed on May 2, 1988.

[7] Along with the Motion to Admit Additional Co-Counsel, on April 28, 1988, Plaintiffs filed fifteen affidavits from individuals and QDEs, many of which discussed the §265 theory of eligibility for legalization. *See* "Notice of Evidence of Defendants' Failure to Comply with the Court's Orders and Renewal of Request to Toll May 4, 1988 Filing Deadline." Further affidavits and declarations were filed the next day, on April 29, 1988.

[8] Respondents appealed certain parts of Supplemental Order V, as well as parts of Supplemental Orders IV and VII. On December 1, 1988, Respondents filed a motion to withdraw those portions of their appeal which dealt

(continued...)

A panel of the D.C. Circuit, in a 2-1 decision, vacated Supplemental Order V. *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C. Cir. 1989), App. 121a. On October 4, 1989, Petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied by a 5-4 vote, App. 208a, and Petitioners subsequently filed a Petition for a Writ of Certiorari with this Court.

While the Petition for a Writ of Certiorari was pending, the district court on August 10, 1990 held an evidentiary hearing and entered an order on September 6, 1990, granting interim relief consisting of work authorization for qualified applicants pending this Court's decision on the Petition. *Ayuda, Inc. v. Thornburgh*, 744 F. Supp. 21 (D.D.C. 1990), App. 322a. (Supplemental Order XIV). The D.C. Circuit, upon Respondents' Motion, subsequently stayed this Order on

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[8](...continued)
with Supplemental Orders IV and VII. This Motion was granted on December 16, 1988. Between the filing of the Notice of Appeal and the Motion for Partial Withdrawal, Respondents filed, on November 18, 1988, a Petition for Writ of Mandamus in the Court of Appeals covering Supplemental Orders XI and XII, which established a Special Master procedure for certain aliens who failed to file legalization applications on or before May 4, 1988. These aliens include the non-registrant aliens who did not receive notice of the May 2 Supplemental Order V in time to file their legalization applications on or before the May 4, 1988 deadline. Following argument, a panel of the D.C. Circuit, in a unanimous opinion issued on March 3, 1989, refused to grant the writ of mandamus, holding that the case "in its present posture does not clearly fail to present a case or controversy, and the district court's continued exercise of jurisdiction does not violate the judicial review provisions of the IRCA." *In Re: Richard Thornburgh*, 869 F.2d 1503, 1517 (D.C. Cir. 1989), App. 216a, 245a.

November 13, 1990. *Ayuda, Inc. v. Thornburgh*, 919 F.2d 153 (D.C. Cir. 1990), App. 108a.

On February 20, 1991, this Court decided *McNary v. Haitian Refugee Center*, *supra*, and, four days later, vacated and remanded *Ayuda* for reconsideration in light of *McNary*. *Ayuda, Inc. v. Thornburgh*, 498 U.S. 1117 (1991), App. 107a. On remand, the D.C. Circuit, once again in a 2-1 decision, held that the judicial review provisions of IRCA precluded district court review. The majority stated that *McNary* merely created an exception to a general preclusion, allowing only for district court review under §1331 of collateral challenges to the legalization program. *Ayuda, Inc. v. Thornburgh*, 948 F.2d 742, 753 (D.C. Cir. 1991), App. 31a, 50a. The majority also held that the INS's §265 policy was not ripe for review, notwithstanding an INS regulation and other policy statements which precluded §265 claims. *Id.* at 754-56, App. 51a-54a. Circuit Judge Wald filed a dissent in which she stated that *McNary* controlled the jurisdictional issues in *Ayuda* and, consequently, IRCA did not preclude the district court's exercise of jurisdiction. *Id.* at 763-65, App. 71a-75a. In addition, Judge Wald stated that the ripeness doctrine did not divest the district court of jurisdiction to consider the challenge to the INS' §265 policy. *Id.* at 769-772, App. 84a-90a.

Petitioners subsequently filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. On March 3, 1992, the panel, by a 2-1 vote, denied the Petition for Rehearing. At the same time, by a 6-5 vote, the full Court of Appeals denied the Suggestion for Rehearing *En Banc*. Three opinions issued. *Ayuda, Inc. v. Thornburgh*, 958 F.2d 1089 (D.C. Cir. 1992) (*en banc*), App. 96a, and Petitioners subsequently filed a second Petition for a Writ of Certiorari with this Court.

In June of last year, this Court decided *Reno v. Catholic Social Services, Inc.*, *supra*, in which the Court reaffirmed its jurisdictional ruling in *McNary*. The Court also held that a

class member's claim would be ripe for review once he or she had taken all affirmative steps possible with respect to an application, before the INS applied a challenged policy or rule to the application. Therefore, "front-desked" claimants - individuals who had attempted to file timely applications with the INS but who were turned away because, under the challenged policy, they would be ineligible - and possibly certain other claimants - would have ripe claims. The Court remanded *CSS* to the Ninth Circuit, with instructions to remand to the district court for further fact-finding on the front-desking issue. *Id.* at 2500 and n.28. Subsequently, the Court vacated and remanded *Ayuda* for reconsideration in light of *CSS*. *Ayuda, Inc. v. Reno*, 113 S. Ct. 3026 (1993), App. 30a.

On remand, the D.C. Circuit - in a 2-1 decision again - declined to follow this Court's directive in *CSS*. *Ayuda, Inc. v. Reno*, 7 F.3d 246 (D.C.Cir. 1993), App. 1a. Notwithstanding substantial evidence in the record that *Ayuda* applicants had been front-desked, the Circuit majority concluded that further fact-finding by the district court was unnecessary because, it said, there were no front-desked claimants. Thus the majority stood by its "conclusion that the district court lacked jurisdiction in this case ...." *Id.* at 247, App. 3a. Judge Wald once again dissented, finding "on the extensive record before us, now spanning over five years" that the Court should not "'rule out the possibility that further facts would allow class members who were not front-desked to demonstrate that the front-desking policy was nevertheless a substantial cause of their failure not [sic] to apply,' or the possibility that some of the thousands of aliens whose claims have been investigated by masters appointed by the district court were not actually front-desked." *Id.* at 252, App. 17a. Indeed, Judge Wald noted that there were "indications" in the *Ayuda* record that applicants do exist who would meet the *CSS* ripeness test. *Id.* at 253 n.3, App. 20a n.3. Petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc* were subsequently denied by

divided votes on January 27, 1994. *Ayuda, Inc. v. Reno*, 14 F.3d 61 (D.C. Cir. 1994), App. 27a.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit has issued a decision that directly contravenes this Court's remand ruling in *Reno v. Catholic Social Services, Inc.*, 113 S. Ct. 2485 (1993). In addition, the ruling is in direct conflict with the Ninth Circuit's rulings on remand in *Catholic Social Services, Inc. v. Reno*, 996 F.2d 221 (9th Cir. 1993) and *League of United American Citizens v. INS*, 999 F.2d 1362 (9th Cir. 1993). Finally, the D.C. Circuit's decision finding no jurisdiction in the district court is contrary to this Court's holdings in *CSS* and *McNary* and contravenes more than twenty years of jurisprudence construing 8 U.S.C. § 1105a not to preclude a district court's general federal question jurisdiction over challenges to INS rules and policies. Accordingly, Petitioners urge that a Writ of Certiorari be issued to the D.C. Circuit so that review by this Court may be made.

1.a. This Court's decision in *CSS* vacated Ninth Circuit decisions in two consolidated cases and remanded them to that Circuit with directions to remand to the respective district courts for further fact-finding pertaining to whether any applicant was "front-desked"[9] by the INS. *CSS*, 118 S. Ct. at

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[9] "Front desking" is the term used by the Court to describe an INS policy whereby an application for legalization was rejected by an INS official prior to a formal filing of that application with an INS office. As the Court described this policy:

> "The INS has issued a manual detailing procedures for its offices to follow in implementing the Reform Act's legalization programs and instructing INS

(continued...)

2500. By the same reasoning that prompted the remands in *CSS*, the D.C. Circuit, whose decision in *Ayuda* was vacated by this Court for reconsideration in light of *CSS*, should have remanded *Ayuda* to the district court for further fact-finding as well. Its failure to do so is clear error.

The legal basis for this Court's decision in *CSS* was that the front-desking policy "would effectively exclude an applicant from access even to the limited administrative and judicial review procedures established by the Reform Act", something the Court found violated the "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action." *CSS* at 2499, citing *McNary*, 498 U.S. at 496. The Court ordered a remand even though it could find no specific evidence in the *CSS* record that any applicant in that case had been front-desked. Indeed, the Court found:

> "None of the named individual plaintiffs in either case alleges that he or she was front-desked, and while a number of affidavits in the *LULAC* record contain the testimony of immigration attorneys and employees of interested organizations that the INS has 'refused,' 'rejected,' or 'den[ied] individuals the right to file' applications, the testimony is limited to such general assertions; none of the affiants refers to any specific

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[9](...continued)
employees ... to review certain applications in the presence of the applicants before accepting them for filing .... '[I]f the applicant is statutorily ineligible,' ... the Manual provides that 'the application *will be rejected* ....' Because this prefiling rejection of applications occurs at the front desk of an INS office, it has come to be called 'front-desking.'"

CSS, 113 S. Ct. at 2497-98 (emphasis in original, citations omitted).

> incident that we can identify as an instance of front-desking."

CSS, 113 S. Ct. at 2499-2500 (footnote omitted). Despite these conclusions, this Court ordered the Ninth Circuit to remand the cases to the district courts for further fact-finding.

In addition, the Court went on to expand the scope of the district court proceedings by holding that:

> "The record reveals relatively little about the application of the front-desking policy and surrounding circumstances. Although we think it unlikely, we cannot rule out the possibility that further facts would allow class members who were not front-desked to demonstrate that the front-desking policy was nevertheless a substantial cause of their failure not to apply, so that they can be said to have had the ... regulation applied to them in a sufficiently concrete manner to satisfy ripeness concerns."

Id. at 2500, n. 28.

Unlike *CSS*, in *Ayuda* there was clear and substantial evidence in the record demonstrating that applicants had been front-desked. First, there were the sworn statements filed by *Ayuda* applicants in the special master proceeding established by the district court in 1988.[10] As a prerequisite for

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[10] The district court established this proceeding under which aliens who had not applied for amnesty because they were "not allowed or [were] dissuaded from filing an application by INS or its agents" could file sworn statements containing their reasons for not seeking legalization by May 4, 1988. *Ayuda, Inc. v. Meese*, *supra*, 687 F. Supp. at 669, 671, App. 286a, 290a (Supplemental Orders VII and IX). As Judge Wald noted in her dissent to the Circuit's majority opinion:

(continued...)

participation in the Special Master Proceeding, an alien must have been somehow dissuaded or discouraged from filing a timely legalization application, *Ayuda, Inc. v. Meese, supra*, 687 F. Supp. at 670, App. 288a, and, indeed, one of the questions on the court-approved "Statement of Reasons," to be reviewed by the Special Masters, specifically allowed for a sworn description of any INS practices that caused the aliens not to file. *See* Question 17 on the "Statement of Reasons." *Id.* at 673, App. 293a. This would necessarily, and did, include front-desking practices.

Nor were the Special Master Statements the only evidence of the front-desking policy in the record below. On August 10, 1990, the district court held an evidentiary hearing on whether to grant work authorization and stays of deportations to the

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[10](...continued)

> "The express purpose of this process was to identify aliens who had been deterred in any way from registering by the INS regulation or INS officials and to ascertain the nature and extent of their injury, so that appropriate remedies could be formulated.... Given this order, the critical factual foundation for whether any of the aliens who filed such statements are eligible under the (front-desking) exception or footnote 28 already exists in the masters' files below."

Ayuda, Inc. v. Reno, supra, 7 F.3d at 252, App. 19a (Wald, J. dissenting), citing *Ayuda, Inc. v. Meese*, 687 F. Supp. at 672-74, and 700 F. Supp. at 50 (D.D.C. 1988).

This special master proceeding was the subject of a previous decision by the D.C. Circuit in *In Re: Richard Thornburgh*, 869 F.2d 1503, App. 216a, by which that Court denied a writ of mandamus requested by the INS and allowed the special master process to continue.

affected aliens. At that evidentiary hearing, one of the applicants offered testimony which clearly demonstrated that he had been front-desked. That applicant testified that he had gone to an INS Office on three separate occasions but had been told that he did not qualify. Transcript of August 10, 1990 Hearing at pp. 193-95. Another witness indicated that she and her sister went to the Los Angeles INS office but were told by the INS official there that they were:

> "not eligible and right after that I was going to ask him question. There was line behind me. He totally ignored us. I mean I kept coming at -- I wanted to ask him a question. He will say, next. He just ignored me completely, so we just left."

Transcript at p. 164.

Thus, unlike in CSS where this Court could find *no* evidence that particular applicants were actually subjected to front-desking yet nevertheless required a remand to the district court, in *Ayuda* there is actual record evidence that applicants were subject to the INS's illegal front-desking policy.[11]

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[11] In addition, as the Dissenting Judge in the D.C. Circuit pointed out, the record is replete with "indications" that "front-desking" persons do in fact exist:

> "*See, e.g.*, Defendants' Opposition to Renewal of Plaintiffs' Motions for Leave to Amend Complaint and for Class Certification, Sept. 26, 1990, at 21 ('testimony ... show[s] wide variation as to whom [at INS] the aliens spoke to, what they said, and what was said to them'); Special Master's Report, Oct. 25, 1989, at 2 (identifiable class of aliens exists who did not file by the May 4, 1988 deadline because they were illegally dissuaded or misled by the INS); Transcript

(continued...)

Despite this, the D.C. Circuit majority refused to remand for further proceedings.

The Circuit majority did so essentially on two grounds: first, that there was no certified class and second, that a representation by counsel for plaintiffs at oral argument four years ago allegedly conceded that no *Ayuda* aliens were ever front-desked. *Ayuda, Inc. v. Reno, supra,* 7 F.3d at 250, App. 11a. Each of these grounds is without justification.

First, in its concern that a class has not been certified in *Ayuda*, the Circuit majority overlooked the unique - and lengthy - history of this case. The original decision by the district court in *Ayuda* was filed on March 30, 1988. Over the next seven months, the court issued twelve Supplemental Orders which, *inter alia*, established the special master procedure. During this period of time, Plaintiffs sought to amend their complaint to certify a class of persons who "failed to apply for legalization prior to May 5, 1988 because they

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[11](...continued)
of Status Call, May 2, 1988, at 35-36 (statements that INS officers in two cities are not accepting applications for legalizing applicants eligible under the terms of the court's order); Bedor Affidavit, attached to Notice of Evidence of Defendants' Failure to Comply with the Court's Orders and Renewal of Request to Toll May 4, 1988 Filing Deadline at ¶ 10 (refusals to accept 'known to the government' applications without fee despite order of the court); Tafoya Affidavit at ¶ 20 (applicants told by INS they were ineligible under 'known to government' criteria and declarant not aware INS kept records of such rejected applications)."

See Ayuda, Inc. v. Reno, supra, 7 F.3d at 253 n.3, App. 20a n.3 (Wald, J., dissenting).

were dissuaded or misled ... [by] the INS or its agents ... or *because they were not allowed to file* or were dissuaded from filing *an application by INS or its agents....*" Plaintiffs' First Amended Complaint at 17-18 (emphasis supplied).[12] A Motion to Amend the Complaint along with the original Motion for Class Certification was filed by Plaintiffs on September 2, 1988 and renewed two years later. Both times the district judge held these motions in abeyance pending completion of the special masters' work. *See Ayuda, Inc. v. Meese, supra*, 700 F. Supp. at 51, 52, App. 300a.[13] *See also In*

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[12] The existence of the filing of this First Amended Complaint would seem to satisfy the D.C. Circuit's puzzling statement that plaintiffs' counsel has not brought to the Court's attention "front-desked" applicants who were - and are - entitled to relief. 7 F.3d at 250, App. 12a. Counsel in fact had brought front-desked applicants to the attention of the district court as can be seen by the filing and renewing of the First Amended Complaint and by bringing front-desked applicants to that court's attention through the authorized special master process. Since the entire district record was on appeal to the Circuit, these instances of front-desked applicants must be deemed to have been brought to the D.C. Circuit's attention. In this connection, it should be pointed out that a stay of the district court remedial proceedings has been in force since 1990, when the D.C. Circuit entered an order staying Supplemental Order XIV. *Ayuda, Inc. v. Thornburgh, supra*, 919 F.2d 153, App. 108a.

[13] In his ruling on the first Motion, the district judge stated:

> "Pending the conduct of this [special master] inquiry, I find it is premature to consider the other motions now pending before me. This would include ... Plaintiffs' Motions For Leave To Amend Complaint And

(continued...)

Re: Richard Thornburgh, supra, 869 F.2d at 1506, 1509, App. 216a, 221a, and *Ayuda, Inc. v. Reno, supra*, 7 F.3d at 252-53, App. 19a (Wald, J., dissenting).[14]

As for the statements of the D.C. Circuit majority that the original individual plaintiffs did not allege that they were front-desked, this is the identical situation that existed in *CSS*. 113 S. Ct. at 2499-2500. Nevertheless, this Court ordered a remand to the district court, and the result should have been no different here.

Concerning the alleged concession by counsel, the D.C. Circuit majority states in its opinion at 7 F.3d at 250, App. 12a, as follows:

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[13](...continued)
For Class Certification. It is my view that until I know whether anybody is embraced by my Opinions and Orders, and the extent and nature of any harm sustained by any person, it would not be fruitful to pursue the other issues that have been presented by the parties. This is particularly so with respect to those motions which ask me to prescribe a particular remedy before the issues I seek to have decided have been fully explored."

Ayuda, Inc. v. Meese, supra, 700 F. Supp. at 51, App. 300a.

[14] The Circuit majority also contends that because a class was never certified only the claims of the named plaintiffs need be considered. However, under this Court's ruling in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 550 (1974), "the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." Therefore, the claims of all putative class members are still pending before the district court.

> "Our dissenting colleague would nevertheless remand to the district judge to permit him now to certify a class if a search of the files of the special masters, appointed by the district judge to identify aliens who were discouraged from filing applications, revealed any that were front-desked. *At oral argument four years ago, appellants conceded that there were none, Ayuda, 880 F.2d at 1342, and we are confident that counsel would have brought any such to our attention long ago since we indicated that those persons would be entitled to relief.*"

7 F.3d at 250, App. 12a (footnote omitted, emphasis supplied). Unfortunately, the D.C. Circuit majority misapprehended its previous analysis of the alleged concession as implying a concession on "front-desking."

The actual citation to the Circuit majority's earlier opinion does not "concede" anything dealing with "front-desking." What the (same) D.C. Circuit majority said back in 1989 was the following:

> "... [A]ppellees conceded at oral argument - and our own review of the affidavits confirms - that, at most, *some* local INS offices were informing aliens that the office would *recommend* denial of applications based on the section 265 theory."

Ayuda, Inc. v. Thornburgh, *supra*, 880 F.2d at 1342, App. 154a (emphasis in original). This "concession" referred to the fact that some, but not all, INS offices were recommending denial of applications based upon a §265 theory. It necessarily presupposes that an application was "accepted" by the INS offices in the first place and certainly cannot be read to concede that INS officers were refusing to accept the applications altogether. Indeed, the citation to the earlier opinion actually provides support for the fact that applicants were being front-desked since the practice referenced there of

INS officers informing aliens that their applications would be denied might, after further fact-finding, be found to be the precise type of policy that became "a substantial cause of [the applicants'] failure not to apply", thus bringing these applicants within the scope of footnote 28 of this Court's *CSS* opinion.[15]

The refusal of the D.C. Circuit to follow the directive of this Court in *CSS* is thus clear error. Petitioners therefore urge this Court to grant their Petition for a Writ of Certiorari to remedy this contravention of *CSS*.[16]

1.b. A clear conflict exists between the District of Columbia and Ninth Circuits over the applicability of this Court's directive in *CSS* to remand to the district courts. The Ninth Circuit has remanded cases in compliance with this Court's directive in *CSS*. It did so in *Catholic Social Services, Inc. v. Reno*, 996 F. 2d 221 (9th Cir. 1993), and *League of United*

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[15] *CSS, supra*, 113 S. Ct. at 2500, n. 28. *See* page 13 *supra*.

[16] In contrast to the claims at issue in *CSS*, *Ayuda* includes not only claims that were allegedly front-desked, but also claims of individuals who filed timely applications based upon the §265 eligibility ground. The Circuit majority did not even acknowledge the existence of such claims.

These pending claims may be ripe for review, as the applicants have certainly taken all of the "affirmative steps possible" with respect to their applications. Moreover, the INS has announced its policy to deny such claims in a precedent decision, *Matter of H* (Assoc. Comm. June 11, 1993). Therefore, these applicants may be in a position to mount a generic challenge to the announced policy. Whether the district court would have jurisdiction over such claims is an important question of federal law, which warrants review by this Court.

American Citizens v. INS, 999 F.2d 1362 (9th Cir. 1993).[17] The D.C. Circuit majority's opinion in *Ayuda* refusing to remand is clearly at variance with these decisions and thus a definite split in the Circuits exists. Petitioners accordingly request that a writ of certiorari issue to the D.C. Circuit so that this Court may settle the conflict among the federal courts over this issue.

2. The *Ayuda* majority's flawed interpretation of the jurisdictional holdings in *CSS* and *McNary* likewise warrants review by this Court.

Following this Court's rejection in *McNary* of the INS's jurisdictional analysis of IRCA's "determination respecting an application" language, the D.C. Circuit majority distinguished *McNary*'s jurisdictional analysis and found it inapplicable to claims that *could* be heard by a court of appeals in review of an individual deportation order. *See Ayuda, Inc. v. Thornburgh*, *supra*, 948 F.2d at 748-54, App. 41a-51a. Subsequently, the

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[17] Similarly, following this Court's directive in *Reno v. Perales*, 113 S.Ct. 3027 (1993), the Second Circuit remanded the companion case of *Perales v. Thornburgh* to the appropriate district court. *Perales v. Thornburgh*, 4 F. 3d 99 (2nd Cir. 1993). However, following petitions for rehearing from both plaintiffs and defendants in that case, the Second Circuit, on March 15, 1994, granted rehearing on the issue of how the case should be decided in light of this Court's decision in *CSS*. *Perales v. Thornburgh*, Nos. 91-6133, 91-6135 and 91-6167 (2d Cir., Mar. 15, 1994).

In *INS v. Legalization Assistance Project of the Los Angeles County Federation of Labor*, 114 S.Ct. 594 (1993), this Court remanded yet another similar case to the Ninth Circuit. The Ninth Circuit has not yet remanded this case to the district court. *See also INS v. Legalization Assistance Project of the Los Angeles County Federal of Labor*, 114 S.Ct. 433 (1993) (O'Connor, J., in chambers).

Ninth Circuit disagreed with the D.C. Circuit's analysis and found §1331 jurisdiction over plaintiffs' legal challenges to the INS regulations and policies at issue in *CSS*. In light of the resulting conflict in the circuits, the INS successfully petitioned the Supreme Court for certiorari in *CSS*.[18]

This Court in *CSS* rejected the INS's jurisdictional arguments - which expressly rested upon the rationale advanced by the D.C. Circuit majority in *Ayuda* - concluding that the INS "gives us no reason" to construe §1255a(f)(1) as reflecting Congress's intent to strip federal district courts of their historical subject matter jurisdiction over challenges to agency policies or regulations:

> [In *McNary*], as here, the critical language was "a determination respecting an application for adjustment of status." We said that "the reference to 'a determination' describes a single act rather than a group of decisions or a practice or procedure employed in making decisions." ... We therefore decided that the language setting the limits of the jurisdictional bar "describes the denial of an individual application" ... and thus "applies only to review of denials of individual ... applications." The INS gives us no reason to reverse course, and we reject its argument that § 1255a(f)(1) precludes district court jurisdiction over an action challenging the legality of a regulation without referring to or relying on the denial of any individual application.

CSS, *supra*, 113 S. Ct. 2494-95 (citations omitted). *See also CSS*, *supra*, 113 S. Ct. at 2501 (O'Connor, J., concurring) ("The Court finds the jurisdictional challenge meritless under [*McNary*] as do I.").

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[18] *See* Petition for Certiorari in *Barr v. Catholic Social Services, Inc.*, No. 91-1826, at pp. 15-16; *see also* Brief for Respondents in *Ayuda, Inc. v. Barr*, No. 91-1924, at p. 5.

Nonetheless, the D.C. Circuit majority, on remand, essentially refused to recognize this Court's clear reaffirmation in *CSS* of the jurisdictional principle announced in *McNary*. Instead, the Circuit majority interpreted the *CSS* ripeness holding to preclude federal question jurisdiction completely.

In *CSS*, this Court embraced the well-established rule that those challenging an administrative action must have felt the effects of that action in a concrete way. *CSS*, *supra*, 113 S. Ct. at 2495. Therefore, in order to challenge the legalization policies at issue in *CSS*, applicants must have pursued their legalization claims as far as possible before the policies at issue cut off the advancement of those claims in one way or another. *Id.* at 2496. As this Court recognized in its discussion of "front-desking", there may be a variety of factual circumstances in which the pursuit of a legalization claim may have been blocked and, as is evidenced by this Court's remand, it is appropriately in the hands of the district court to examine such factual circumstances to decide which applicants have ripe claims.

The D.C. Circuit majority, however, misread this Court's ripeness holding to require that a legalization claim must be *denied* in order for it to become "ripe".

> "The claimant must at least apply and be denied the benefit before the claim ripens. Typically, when the claimant is denied the benefit, the claim is then ripe for adjudication."

7 F.3d at 249, App. 8a-9a.

Inevitably, according to the Circuit majority's interpretation, such "ripe" or denied claims must be routed through IRCA's special review provisions. Thus the Circuit

majority turned this Court's ripeness analysis in *CSS* into a complete foreclosure of judicial review under 28 U.S. C. §1331.

The Circuit majority, moreover, plainly *admitted* that its reading of *CSS* would result in a total blockage of access to federal question jurisdiction:

> "At the end of the day, then, the Supreme Court conclusively foreclosed all efforts to gain federal district court review of INS interpretation of IRCA."

7 F.3d at 249, App. 10a. The majority even went so far as to suggest that *CSS* undermines the well-established jurisprudence interpreting INA §106 (8 U.S.C. § 1105a) to *permit* district court review of legal challenges to INS regulations and policies.[19] 7 F.3d at 249 n.6., App. 9a n. 6.

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[19] *See, e.g., El Rescate Legal Services, Inc. v. Executive Office of Immigration Review*, 941 F.2d 950, 953 (9th Cir. 1991); *Campos v. Nail*, 940 F.2d 495 (9th Cir. 1991); *Montes v. Thornburgh*, 919 F.2d 531, 535-39 (9th Cir. 1990); *National Center for Immigrants' Rights, Inc. v. INS*, 743 F.2d 1365, 1368-69 (9th Cir. 1984), *vacated on other grounds*, 481 U.S. 1009 (1987), *reaffirmed on remand*, 913 F.2d 1350, 1352 (9th Cir. 1990), *reversed on other grounds*, 112 S.Ct. 551 (1991); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033 (5th Cir. 1982); *Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir. 1984), *affirmed* 472 U.S. 846 (1985); *Salehi v. District Director*, 796 F.3d 1286, 1290 (10th Cir. 1986); *Hotel & Restaurant Employees Union v. Smith*, 563 F. Supp. 157, 162 (D.D.C. 1983), *summary judgment granted for defendant*, 594 F.Supp. 502 (D.D.C. 1984), *affirmed by equally divided court*, 846 F.2d 1499 (D.C. Cir. 1988); *Abdelhamid v. Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985).

Certainly, this Court did not intend *CSS* to be such a wholesale reversal of the many years of legal precedents which allow for federal district court jurisdiction over challenges to INS rules and policies. Had this Court desired such a result, it would have clearly overruled *McNary* instead of resoundingly affirming it.

Once again, the Circuit majority is completely at odds with the holdings of this Court as well as with long-standing jurisprudence. This Court should therefore grant certiorari in order to resolve the significant legal inconsistency presented by the Circuit majority.

CONCLUSION

For all the above reasons, Petitioners request that their Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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